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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MIKAELA CADENA, individually and as Trustee, etc., Plaintiff and Appellant, v. LYDIA VOSE, Defendant and Respondent; HELEN WISE, Objector and Appellant.	F080428 (Super. Ct. Nos. BPB 18-002681; BCV 18-101723) **OPINION**

APPEAL from orders of the Superior Court of Kern County. Ralph W. Wyatt, Judge.

Darling & Wilson, Joshua G. Wilson, Anton H. Labrentz, and Nathan J. Oleson for Plaintiff and Appellant Mikaela Cadena.

Dake, Braun & Monje, Craig N. Braun for Objector and Appellant Helen Wise.

LeBeau-Thelen, Andrew K. Sheffield, Patrick Charles Carrick, Thomas P. Feher, and Chelsie L. Morgan, for Defendant and Respondent Lydia Vose.

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In this opinion we address three related appeals.

The first is an appeal from the probate court's order granting a special motion to strike pursuant to California's anti-strategic lawsuit against public participation (anti-SLAPP) statute (Code Civ. Proc., § 425.16),[1] and striking an underlying probate petition. We affirm the probate court's order granting the anti-SLAPP motion and striking the underlying petition.

The second appeal challenges the probate court's order granting attorney's fees to the party that brought and prevailed on the anti-SLAPP motion, resulting in the striking of the underlying probate petition. We affirm the probate court's order granting attorney's fees.

The third appeal raises questions of standing in relation to the other appeals. We conclude the standing issue is moot in light of our dispositions in the other appeals.

FACTS AND PROCEDURAL HISTORY

We will summarize background facts in order to contextualize the questions at issue on appeal. The facts, however, were not admitted into evidence in the proceeding below and are drawn from the parties' briefs as well as pleadings filed below. The background facts are undisputed.

This case arises from a trust—the Andrew V. Negrete and the Ruth O. Negrete 1987 Trust—established in 1987 by a married couple, Andrew and Ruth Negrete. The trust's corpus consisted of the community property of Andrew and Ruth, mainly multiple rental homes and other real estate properties. The settlors, Andrew and Ruth, were also the initial trustees of the trust. The trust was amended and completely restated in January 2003, and amended a second time in April 2003 (collectively, the trust or the original trust). Ruth died in May 2003. After Ruth's death, Andrew became the sole trustee, in

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[1] Undesignated statutory references are to the Code of Civil Procedure.

accordance with the provisions of the trust instrument. Andrew remained sole trustee of the trust until his death in December 2017.

Andrew and Ruth had four children together: Robert Negrete, Rudy Negrete, Helen Wise, and Lydia Vose. Ruth also had two other children from a previous marriage: Irene Castaneda and Antonio Torres. Antonio Torres died in or around 2012; he was survived by two children. Robert Negrete's son, Robert Angelo Negrete (Angelo Negrete), is also relevant in the context of the trust, as is Helen Wise's daughter, Mikaela Cadena (appellant in the instant matters).

The trust instrument specified how the trust was to be administered following the death of a settlor. The trust instrument also specified a distribution plan for the trust's assets that would take effect following the deaths of both settlors. In addition, the trust instrument provided that upon the respective deaths of Andrew and Ruth, their daughters, Helen and Lydia, would become co-trustees, and if either Helen or Lydia was unavailable or unwilling to serve, then the other would become sole trustee. (Trust, Article XIII.)

The parties agree that following Ruth's death, during Andrew's tenure as sole trustee, Andrew did not administer the trust in accordance with the trust instrument. During Andrew's tenure as sole trustee (2003 to 2017), he also made, between 2010 and 2017, five unilateral amendments to the trust. The unilateral amendments, along with Andrew's failure to administer the trust as set forth in the original trust instrument, resulted in drastic changes to the distribution plan set forth in the original trust.

The original trust instrument named as beneficiaries the children of Andrew and Ruth, Ruth's children from her prior marriage, and Angelo Negrete, a grandson of Andrew and Ruth. (Trust, Article VIII.) Under the amendments unilaterally executed by Andrew after Ruth's death, the disposition plan set forth in the original trust instrument was radically altered as Mikaela Cadena, Helen Wise's daughter and the granddaughter of Andrew and Ruth, became the primary beneficiary of the trust's assets, to the

detriment of the beneficiaries named in the original trust instrument. In addition, Andrew's unilateral amendments purported to override and change the designation, in the original trust instrument, of Helen Wise and Lydia Vose as successor trustees of the trust following the deaths of the settlors. Andrew's unilateral amendments named Mikaela Cadena as the successor trustee of the trust.

Upon Andrew's death, Cadena assumed the role of trustee. On March 5, 2018, Cadena served to interested parties, a " 'Notification by Trustee Pursuant to Probate Code [section] 16061.7,' " as required by that statute when a trust becomes irrevocable upon the death of a settlor. (Prob. Code, § 16061.7, subd. (a).) Cadena attached to the notice, documents reflecting the terms of the trust, including Andrew's unilateral amendments, and specified in the notice that she was the successor trustee of the trust. Cadena served the notice on Helen Wise, Lydia Vose, Irene Castaneda, Rudy Negrete, Robert Negrete, and the two children of Antonio Torres. Probate Code section 16061.8 specifies, in pertinent part, that persons served with a notice under Probate Code section 16061.7 by the trustee of a trust "may bring an action to contest the trust" *no later than* "120 days from the date" of service of the notice.

On July 2, 2018, within 120 days after service of Cadena's Probate Code section 16061.7 notice, Vose filed a petition for order (July 2, 2018 petition) in the Kern County Superior Court (case No. BPB-18-002681) challenging, inter alia, Andrew's unilateral amendments to the trust; the petition named Cadena and Wise as respondents. Castaneda subsequently joined Vose's petition. Thereafter, on July 16, 2018, Vose, in her capacity as trustee under the original trust instrument, filed a civil complaint against Cadena in the same court (case No. BCV-18-101723); the complaint stated a claim for declaratory relief and another claim for partition by sale of the trust's real property. The superior court partially granted a motion for judgment on the pleadings brought by Cadena in the civil matter (part of Vose's cause of action for declaratory relief survived Cadena's motion for

judgment on the pleadings). Eventually, the two actions brought by Vose—the petition for order and the civil action—were "consolidated for all purposes under the Probate Case"; the consolidated case remains pending in a pretrial posture before the probate court. The parties extensively litigated various ancillary matters related to the pending case.

Meanwhile, Cadena distributed the real properties owned by the trust in accordance with the distribution plan effected by Andrew's unilateral amendments, that is, she distributed the real properties mainly to herself. Eventually, the probate court granted Vose's request for a preliminary injunction restricting Cadena's ability to dispose of trust assets pending resolution of the litigation involving the trust.

On January 3, 2019, while Vose and Castaneda's consolidated case was pending trial, Cadena filed a petition to enforce no contest clauses that were added to the original trust instrument by Andrew's unilateral amendments. Cadena sought by means of this "petition to enforce no contest clause" or disinheritance petition, to disinherit Vose and Castaneda with respect to the trust's assets, on account of the fact that they had challenged, by filing the July 2, 2018 petition and subsequent civil complaint, Andrew's unilateral amendments and changes to the distribution plan set forth in the original trust instrument. Wise joined Cadena's disinheritance petition.

On June 27, 2019, Vose filed, pursuant to California's anti-SLAPP statute,[2] a special motion to strike Cadena and Wise's disinheritance petition (anti-SLAPP motion); Castaneda joined Vose's anti-SLAPP motion. (See § 425.16 (anti-SLAPP statute).) A hearing on the anti-SLAPP motion took place on July 29, 2019, followed by a further hearing on July 31, 2019. On August 26, 2019, the trial court granted Vose and Castaneda's anti-SLAPP motion and struck Cadena and Wise's disinheritance petition.

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[2] " ' "SLAPP" is an acronym for "strategic lawsuit against public participation." ' " (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 785, fn. 1.)

The probate court subsequently granted, pursuant to the anti-SLAPP statute, Vose's motion for attorney's fees incurred in litigating the anti-SLAPP motion. (See § 425.16, subd. (c).) The court awarded attorney's fees to Vose in the amount of $13,889.00, payable by Cadena, in her individual capacity, and Wise, jointly and severally.

Cadena and Wise have, collectively, filed three appeals challenging the probate court's rulings granting Vose and Castenda's anti-SLAPP motion and Vose's related motion for attorney fees. First, Cadena, individually, and Wise challenge the probate court's ruling granting Vose and Castaneda's anti-SLAPP motion (*Cadena et al. v. Vose*, case No. F079863); Cadena and Wise's briefs in this appeal are virtually identical. Next, Cadena challenges, as trustee, the probate court's ruling granting the anti-SLAPP motion (*Cadena v. Vose*, case No. F080183); Cadena incorporates by reference her briefs in case No. F079863 and, other than on the issue of standing, she raises no new issues as to the merits. Finally, Cadena and Wise challenge the probate court's ruling granting to Vose attorney's fees incurred in litigating the anti-SLAPP motion (*Cadena et al. v. Vose*, case No. F080428). We resolve all three appeals in this opinion.

DISCUSSION

I. Probate Court Properly Granted Vose and Castaneda's Anti-SLAPP Motion

As noted, Cadena and Wise challenge the probate court's ruling granting Vose and Castaneda's anti-SLAPP motion, resulting in the striking of Cadena and Wise's underlying disinheritance petition. We affirm.

1. The Anti-SLAPP Statute and Standard of Review

The anti-SLAPP statute, section 425.16, provides a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) "When served with a SLAPP suit, the defendant may immediately move to strike the complaint under section

425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process." (*Hansen v. Department of Corrections & Rehabilitation* (2008) 171 Cal.App.4th 1537, 1543 (*Hansen*); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).)

The first prong of the anti-SLAPP analysis requires the court to decide "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon, supra,* 29 Cal.4th at p. 67; § 425.16, subd. (b)(1).) The defendant makes this showing by demonstrating the acts of which the plaintiff complains were taken "in furtherance of the [defendant's] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1); *Equilon,* at p. 67.) To ensure that participation in matters of public significance is not chilled, the anti-SLAPP statute mandates that its terms "shall be construed broadly." (§ 425.16, subd. (a); *Equilon,* at p. 60; see *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 23 ["The Legislature inserted the 'broad construction' provision out of concern that judicial decisions were construing [the public participation] element of the statute too narrowly."].)

If the court determines the defendant has made the threshold showing, "it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*); § 425.16, subd. (b)(1).) To establish the requisite probability of prevailing, the plaintiff need only have " 'stated and substantiated a legally sufficient claim.' " (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.) "Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' " (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (*Wilson*); *Navellier,* at pp. 88-89.)

We review both prongs of the anti-SLAPP analysis de novo. (*Hansen*, *supra*, 171 Cal.App.4th at p. 1544.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute."[3] (*Navellier*, *supra*, 29 Cal.4th at p. 89.)

2. Cadena and Wise's Disinheritance Petition Arises out of Protected Activity

Starting with the first prong of the anti-SLAPP analysis, we consider "whether the defendant [or respondent] has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon*, *supra*, 29 Cal.4th at p. 67; § 425.16, subd. (b)(1).) This in turn requires us to consider whether Cadena and Wise's disinheritance petition arose from acts taken by Vose and Castaneda in furtherance of their "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).)

Section 425.16, subdivision (e), elaborates on what constitutes an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' " (§ 425.16, subd. (e).) As pertinent here, such conduct includes "any written or oral statement or writing made before a … judicial proceeding." (§ 425.16, subd. (e)(1).)

Vose and Castaneda's filing of the July 2, 2018 petition and subsequent civil complaint, and the resulting consolidated action before the probate court, necessarily involved a "writing made before a … judicial proceeding," and therefore counts as

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3 Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

protected activity for purposes of section 425.16, subd. (b)(1). (See *Key v. Tyler* (2019) 34 Cal.App.5th 505, 518 (*Key*) ["A judicial challenge to a trust or other protected instrument involves a 'writing made before a … judicial proceeding."].) An action to enforce a no contest clause, in turn, is necessarily based upon such conduct, and "therefore falls within the express statutory definition of conduct that arises from protected petitioning conduct under step one of the anti-SLAPP procedure." (*Ibid.*; *Urick v. Urick* (2017) 15 Cal.App.5th 1182, 1194-1195 (*Urick*) [a petition to enforce a no contest clause that "arises from a pleading filed with the probate court" is subject to the anti-SLAPP statute].) Accordingly, Vose and Castaneda have properly established that Cadena and Wise's disinheritance petition arose from Vose and Castaneda's protected petitioning conduct. Vose and Castaneda have therefore made the requisite showing in the first step of the anti-SLAPP analytic process. The probate court reached a similar conclusion and, indeed, there is no dispute between the parties on this point.

Having concluded that Cadena and Wise's disinheritance petition arises from protected activity, we turn to the second prong of the anti-SLAPP analysis—whether Cadena and Wise have established the probability of prevailing in that action.

3. Cadena and Wise Failed to Establish a Probability of Prevailing on Their Disinheritance Petition

To establish a reasonable probability of prevailing under the second prong of the anti-SLAPP analysis, "the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' " (*Wilson, supra*, 28 Cal.4th at p. 821.) "In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a

matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Ibid.*)

The probate court concluded that Cadena and Wise failed to show a probability of prevailing on their petition to enforce no contest clause or disinheritance petition. The court therefore granted Vose and Castaneda's anti-SLAPP motion and further ruled that Cadena and Wise's "petition to enforce the no contest clause is stricken in its entirety." We affirm.

(a) Original Trust Instrument and Andrew's Unilateral Amendments[4]

As noted, Ruth and Andrew established the trust in 1987. Ruth and Andrew jointly amended the trust twice, in January 2003 and April 2003, ahead of Ruth's death in May 2003. The first amendment completely amended and restated the trust, and the second amendment amended and restated Article VIII (discussed below). As mentioned, we will refer to the trust and the first two amendments collectively as the trust or original trust.

The trust specifies that Ruth and Andrew had "accumulated significant amounts of property during their marriage," hence their desire to create an inter vivos trust. (Trust, Preamble.) A list ("Schedule 'A' ") attached to the trust described all the real and personal property placed in the trust; the document specifies that all the listed property consisted of the community property of Ruth and Andrew. (Trust: Declaration of Trust & Schedule 'A'.) (Indeed, there is no dispute between the parties that the trust consists of the community property of Ruth and Andrew.) The trust further states that "[a]ny community property transferred to the trust shall remain community property after its transfer." (Trust, Article I.) The trust refers to the property subject to the trust

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4 Copies of the trust and all amendments were attached as an exhibit to the disinheritance petition filed by Cadena.

instrument as the "trust estate" and specifies that the trust estate "shall be held, administered and distributed in accordance with the [trust] instrument." (Trust, Article I.)

Ruth and Andrew were designated as the initial trustees of the trust. The trust further provides that should one of the settlors be unable to act as trustee, then the other one would act as sole trustee. The trust also names Helen Wise and Lydia Vose as successor trustees, once both Ruth and Andrew were unable to act as trustees; the trust clarifies that if either Wise or Vose is unable to act as a trustee, then the other one would act as sole trustee. (Trust: Declaration of Trust & Article XIII.) During the joint lifetime of the settlors, the net income from the trust estate was to be paid to the settlors; the principal of the trust estate could also be tapped, at the trustees' discretion, for the settlors' "proper health, education, support, maintenance, comfort and welfare." (Trust, Article II (A).)

The trust provides specific instructions for the administration of the trust upon the death of either settlor. Under the terms of the trust, on the death of any one of the settlors, the surviving settlor and trustee was required to allocate the existing trust estate "into three (3) separate [sub-]trusts, designated 'Survivor's Trust' and the 'Residual Credit Shelter Trust' and the 'Residual Marital Trust.' " (Trust, Article III (A).) The Survivor's Trust was to be funded with the "Surviving Spouse's interest in the Settlors' community property" held by the trust. (Trust, Article III (B).) The Residual Marital Trust was to be funded with "a pecuniary amount"—calculated with reference to a specified formula—to be drawn from the deceased spouse's interest in the community property held by the Trust. (Trust, Article III (C).) The Residual Credit Shelter Trust was to consist of the balance of the deceased spouse's interest in the community estate held by the trust. (Trust, Article III (D).)

Thus, upon Ruth's death, Andrew's interest (50 percent) in the community property comprising the trust estate was to be allocated to the Survivor's Trust and Ruth's

interest (50 percent) in the same was to be allocated to the Residual Trusts. In other words, all three sub-trusts were to be funded *with the community property held by the trust*, with one half of the community estate in the trust allocated to the Survivor's Trust and the other half of the community estate in the trust allocated to the Residual Trusts. The trust provides that "physical" division of specific trust assets was not required; rather the trustee was required to "keep separate accounts for the different undivided interests." (Trust, Article XI (D).) The trust provides that after the death of one spouse, the net income from the Survivor's Trust and the Residual Marital Trust would be paid to the surviving spouse, plus any net income from the Credit Shelter Trust that the trustee deemed appropriate. The trust further permitted the trustee to invade the principal of the Residual Trusts for specified, limited purposes, that is the surviving spouse's "proper health, support, maintenance, and education." (Trust, Article V (A).)

Article VII of the trust provides: "On the Surviving Spouse's death, the Trustees shall add to the Residual Credit Shelter Trust any portion of the Survivor's Trust, if any, not effectively disposed of as hereinabove provided[5] and shall add to the Residual Credit Shelter Trust the remaining balance, if any of the Residual Marital Trust, to [be] follow[ed] [by] the disposition of the Residual Credit Shelter Trust in all respects as herein provided." Article VIII, as revised and restated by the second amendment executed by Ruth and Andrew, then provided for distributions from the Residual Credit Shelter Trust to several family members. Specifically, Article VIII provided, in pertinent part: "After the death of the Surviving Spouse, the Trustees shall distribute, free of trust, to Robert Angelo Negrete, by right of representation, all of the trust's right[s], title, and interest in that certain real property known as 809 Golden State, Bakersfield, California."

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5 Article VI of the trust provided for the assets of the Survivor's Trust to be used, inter alia, to defray "payment of debts, expenses of last illness, funeral expenses, administration expenses and other costs incurred for the Surviving Spouse's support."

(Trust, Article VIII (A).) Article VIII further provided, in pertinent part: "After the death of the Surviving Spouse, the Trustees shall distribute the remaining trust estate to Lydia Vose, by right of representation, Helen Wise, by right of representation, an[d] Irene Castaneda, by right of representation." (Article VIII (B), unnecessary italics omitted.)

Article IX of the trust addresses issues of revocation and amendment of the trust. As to revocation, Article IX, paragraph (A) specifies, in pertinent part: "During the joint lifetimes of the Settlors, this trust may be revoked in whole or in part with respect to community property by an instrument in writing signed by either Settlor and delivered to the Trustees and the other Settlor." (Trust, Article IX (A).) As to amendment of the trust, Article IX, paragraph (C) specifies, in pertinent part: "The Settlors may at any time during their joint lifetimes amend any of the terms of this instrument by an instrument in writing signed by both Settlors and delivered to the Trustees." (Trust, Article IX (C).)

Article IX, paragraph (B) addresses revocation and amendment of the sub-trusts: "On the death of the Deceased Spouse, the Surviving Spouse shall have the power to amend, revoke, or terminate the Survivor's Trust but the Residual Trust may not be amended, revoked or terminated. On revocation or termination of the Survivor's Trust, all of the assets shall be delivered to the Surviving Spouse. On the death of the Surviving Spouse, neither trust may be amended revoked or terminated." Article IX, paragraph (B) does not delineate a method for revoking or amending the Survivor's Trust. Rather, it provides: "Revocation and amendment shall be made in the manner provided in paragraphs A and C of this Article IX." (Trust, Article IX (B).) However, as indicated above, Article IX, paragraphs (A) and (C), appear to apply only to revocation and amendment of the trust as whole and specify that revocation and amendment may only occur during the settlors' joint lifetimes. In addition, Article IX specifies that "[t]he

powers of the Settlors to revoke or amend this instrument are personal to them and shall not be exercisable on their behalf by [other persons]." (Trust, Article IX (D).)

The trust also contained a no contest clause in Article XVI that provided, in part: "The Settlors and each of them have purposely made no provision for any other person, including but not limited to Robert Andrew Negrete, Rudy Negrete, and Antonio Torres, whether claiming to be an heir of Settlors or not, and if any person, whether beneficiary under this Trust or not mentioned herein, shall contest this Trust or object to any of the provisions hereof, the Settlors and each of them give to such person so contesting or objecting the sum of One Dollar ($1.00), and no more, in lieu of the provisions which they have made or which they might have made herein for such person so contesting or objecting."

The parties agree that after Ruth's death, Andrew failed to administer the trust in accordance with the trust instrument. More specifically, he failed to formally create and fund the sub-trusts by allocating the trust's assets to separate accounts for each sub-trust. (See Trust, Article XI (D).) In addition, between 2010 and 2017, Andrew executed five unilateral amendments (the Third through Seventh Amendments) that purported to: (1) amend the disposition plan for the trust estate as a whole, set forth in Article VIII, as restated in the Second Amendment (executed by both Ruth and Andrew, prior to Ruth's death); (2) change the designation of the successor trustees for the trust as a whole, as set forth in Article XIII; and (3) amend and supersede the no contest clause set forth in Article XVI.

First, on October 19, 2010, Andrew unilaterally added the Third Amendment to the trust. The Third Amendment "deleted and superseded in total" Article VIII of the trust and replaced the distribution plan stated therein with a completely different distribution plan as to all the trust's assets. Under the Third Amendment, upon Andrew's death, the property located at 809 Golden State, Bakersfield, California, (809 Golden

State) was to be distributed to Robert Negrete rather than Angelo Negrete. The Third Amendment also provided that specific properties would be distributed to Helen Wise, Robert Negrete, Rudy Negrete, Irene Castaneda, Lydia Vose, and Antonio Torres (with right of representation in each case). The Third Amendment further provided that any remaining trust assets would be distributed among Rudy Negrete, Robert Negrete, Lydia Vose, Helen Wise, Irene Castaneda, and Antonio Torres (with right of representation in each case).

In addition to completely revising the distribution plan in Article VIII of the trust, the Third Amendment purportedly "deleted and superseded in total" Article XVI of the trust, which article set forth the original no contest clause. Article XVI, as purportedly amended by the Third Amendment, provided:

> " 'Except as otherwise provided, the Settlor has intentionally and with full knowledge omitted providing for any of his heirs who may be living at the time of the Settlor's death. Settlor has purposely made no provision for any such person, whether claiming to be an heir or not, and if any person … whether beneficiary under the Trust or not mentioned herein shall contest this Trust or the Settlor's Will, directly or indirectly, or make any claim against this trust or the Settlor's estate, directly or indirectly, including, but not limited to, a claim that the Settlor Andrew Negrete improperly amended the trust as to any property owned by the trust, including the part formerly owned by the Ruth O. Negrete [sic], a claim of ownership of any asset of the trust or of the Settlor, or a probate homestead, or a family allowance, or a claim that the property should not remain in trust, or a claim that the Settlor had an agreement with any beneficiary herein regarding the ownership of any property or the disposition of any property, or interferes in any manner, directly or indirectly, with the funeral arrangements that the Settlor makes regarding the disposition of his remains, Settlor directs the Trustee herein to give said person the sum of One Dollar ($1.00) and no more in lieu of the provisions which Settlor has made or which he might have made herein for such person so contesting or objecting or claiming.' " (Unnecessary capitalization omitted.)

Next, on July 2, 2013, Andrew unilaterally added the Fourth Amendment to the trust. The Fourth Amendment purported to delete and supersede "in total" "Article VIII

of the original instrument and all subsequent amendments," and to replace them with a new distribution plan for all the trust's assets. Under the Fourth Amendment, upon Andrew's death, 809 Golden State and another property were to be distributed to Robert Negrete, subject to the condition that the latter "pay the sum of twenty-five thousand dollar ($25,000) to the trust, which shall be distributed pursuant to the residue." The Fourth Amendment also provided that specific properties would be distributed to Helen Wise, Robert Negrete, Rudy Negrete, Irene Castaneda and Lydia Vose (with right of representation in each case); Antonio Torres and his heirs were removed as beneficiaries (Antonio had died in 2012). The Fourth Amendment further provided that any remaining trust assets would be distributed among Rudy Negrete, Robert Negrete, Lydia Vose and Helen Wise (with right of representation in each case). Irene Castaneda and Antonio Torres (or his heirs) were no longer residuary beneficiaries. Antonio Torres or his heirs were to receive nothing at all.

In addition to again revising the distribution plan in Article VIII of the trust, the Fourth Amendment purportedly "deleted and superseded in total" Article XVI of the trust, which Article set forth the no contest clause previously added by Andrew's unilateral Third Amendment. The Fourth Amendment added a no contest clause that was identical to the no contest clause in the Third Amendment (see above).

On September 15, 2014, Andrew unilaterally added the Fifth Amendment to the trust. The Fifth Amendment purported, once again, to delete and supersede Article VIII of the trust and subsequent amendments and replace them with yet another distribution plan regarding all the trust's assets. Under the Fifth Amendment, upon Andrew's death, various properties were to be distributed to Robert Negrete, Helen Wise, Rudy Negrete, Irene Castaneda, and Lydia Vose. Any remaining trust estate was to be distributed to Robert Negrete, Rudy Negrete, Helen Wise and Lydia Vose.

The Fifth Amendment also "deleted and superseded in total" "Article XIII, Paragraph A of the original instrument," which article named the successor trustees of the trust. Whereas the original trust instrument named Helen Wise and Lydia Vose as successor trustees following the deaths of the settlors, the Fifth Amendment named Helen Wise as the sole successor trustee and further provided that should Helen Wise be unable to act as trustee, Mikaela Cadena would be the sole successor trustee.

On July 8, 2016, Andrew unilaterally added the Sixth Amendment to the trust. The Sixth Amendment provided: "Article VIII of the original instrument and all subsequent amendments related to the trust [are] deleted and superseded in total." Under the Sixth Amendment, Article VIII set forth another entirely new distribution plan for the entirety of the trust's assets, to be effectuated on Andrew's death. Specifically, 809 Golden State and another parcel were to be distributed to Robert Negrete on the condition that he paid $25,000 to the trust to be distributed as part of the trust "residue." In addition, one parcel of real property was to be distributed to Helen Wise and another to Rudy Negrete. The remaining 16 parcels of real property held by the trust were to be distributed to Mikaela Cadena. Finally, any residue left in the trust estate was to be distributed to Rudy Negrete, Robert Negrete, Lydia Vose, and Helen Wise. Irene Castaneda and Antonio Torres—Ruth's children from a prior marriage—were to receive nothing at all.

On May 25, 2017, Andrew unilaterally added the Seventh Amendment to the trust. The Seventh Amendment purported to delete and supersede "in total" "Article XIII of the original [trust] instrument and all subsequent amendments" that named the successor trustee(s) for the trust. The Seventh Amendment provided, in pertinent part: "If Andrew V. Negrete shall for any reason cease to act as a Trustee, Mikaela Cadena shall act as sole Trustee. If Mikaela Cadena shall for any reason cease to act as a Trustee, Helen Wise shall act as sole Trustee." (Unnecessary capitalization omitted.)

(b) Vose and Castaneda's Petition for Order and Civil Complaint

On July 2, 2018, Vose filed a petition—in which Castaneda joined—challenging the validity and scope of Andrew's unilateral amendments to the trust instrument following Ruth's death. The petition named Cadena and Wise as respondents. The petition noted: "During Andrew's lifetime, he had the authority to amend and/or revoke the 'Survivor's Trust' but was prohibited by the Trust terms from amending or revoking the Residual Trusts." (Emphasis in original.) The petition cited Article IX, paragraph B of the Trust instrument, which article provides: "On the death of the Deceased Spouse the Surviving Spouse shall have the power to amend, revoke or terminate the Survivor's Trust but the Residual Trust may not be amended, revoked or terminated."

The petition further alleged that "subsequent to Ruth's demise Andrew failed to formally create and fund the Residual Trusts with Ruth's one-half (1/2) of [the couple's] community property." Among other relief sought, the petition stated: "Petitioner requests that the Court issue an Order and Judgment declaring that, to the extent the Third through Sixth Amendments modified the manner in which the [Trust's] assets were to be distributed, that such purported amendment(s) (to the extent valid [at all]) only relate to the Survivor's Trust."

In addition, the petition asked the court to issue an order declaring the Third through the Sixth Amendments null and void. More specifically, the relief sought by the petition included: "An order declaring that, to the extent that the purported amendment of the manner in which the Trust assets are to be distributed to the beneficiaries pursuant to the Third through Sixth Amendments had the effect of purportedly modifying the manner in which the assets of the Residual Trusts were to be distributed, such purported amendments are null and void and the distribution of the assets of the Residual Trusts shall be provided pursuant to Article VIII of the Second Amendment to the Trust."

The petition also alleged as to "at least the Sixth and Seventh Amendments"—which Amendments respectively left the bulk of the trust's corpus (16 parcels of real property) to Cadena and named Cadena as the successor trustee of the entire trust—that these amendments were improperly procured by Cadena and Wise by exerting "undue influence" on Andrew; taking advantage of the "trust and confidence" Andrew reposed in them as family members and, in the case of Cadena, his longtime caretaker; and isolating Andrew from other family members. Among other relief sought, the petition stated: "As a result of the undue influence by Respondents Mikaela [Cadena] and Helen [Wise], the Sixth and Seventh Amendments are unenforceable and should be declared null and void. Upon such a declaration, Vose should be declared the trustee of the Trust pursuant to Article XIII of the [original Trust instrument]."

In addition to the probate petition, on July 16, 2018, Vose filed a civil action against Cadena, to enforce the creation and funding of the Residual Trusts. Vose filed the civil complaint solely in her capacity as *trustee* of the Residual Trusts; Castaneda therefore did not join Vose's civil complaint.

(c) Cadena and Wise's Disinheritance Petition

After Vose filed the probate petition and civil complaint, Cadena responded by filing a petition to enforce the identical no contest clauses contained in Andrew's unilateral Third and Fourth Amendments, which purported to amend Article XVI of the trust instrument (Article XVI contained the original no contest clause). Under the terms of the Fourth Amendment, the no contest clause in the Fourth Amendment superseded the no contest clause in the Third Amendment. Cadena's petition to enforce no contest clause stated, inter alia, that Vose and Castaneda had filed a probate petition alleging that Andrew had "improperly amended the Trust." It further stated: "As a result of filing the Probate Petition both Lydia Vose and Irene Castaneda have violated Article XVI of the Trust and are entitled to the sum of One Dollar ($1.00) *and no more* from the assets of

the Trust." (Italics added.) Cadena's petition did not state which part of the no contest clause in Andrew's unilateral amendments was implicated by Vose's probate petition, also joined by Castaneda. Cadena's petition potentially relied on the part of the no contest clause in the Third and Fourth Amendments that provided that any person who made a "claim that the Settlor Andrew Negrete *improperly amended* the trust as to any property owned by the trust, including the part formerly owned by Ruth Negrete," would receive no more than $1.00 from the Trust. (Unnecessary capitalization omitted, italics added.)

Cadena's petition also noted, with respect to Vose's civil complaint, inter alia, that Vose had asked for "declaratory relief" to enforce the rights of the Residual Trust. Specifically, the petition asserted: "The Civil Complaint pleads a cause of action for declaratory relief in which Vose claims, among other things, that the community property interest in the Trust held by Ruth in 2003 is property of the Residual Trust created under the Restated Trust which Vose purports to represent. She then seeks partition of the real property held by the Trust[, thereby] claiming a direct property interest [in her capacity as trustee of the Residual Trust,] in said real property." Cadena's petition further stated: "The Civil Complaint, and each of the allegations asserted therein, violate Article XVI of the Trust and Vose is entitled to the sum of One Dollar ($1.00) *and no more* from the assets of the Trust." (Italics added.) Again, the petition did not specify which provision of the no contest clause in Andrew's unilateral amendments was implicated by Vose's civil complaint. Nor does it appear that the no contest clause unilaterally added by Andrew would be triggered by Vose's civil complaint, especially as Vose brought the civil complaint in her capacity as trustee of the Residual Trusts under the terms of the original trust, not in her capacity as a beneficiary.

In summary, Cadena's petition to enforce no contest clause/disinheritance petition sought essentially to *disinherit Vose and Castaneda completely* with respect to the assets

of the Trust. Significantly, Cadena brought the petition to enforce no contest clause to completely disinherit Vose and Castaneda as to all trust assets *before* the claims in Vose and Castaneda's probate petition and Vose's civil complaint were tried and resolved on the merits, including the questions of the validity and/or scope of application of Andrew's unilateral amendments, which amended, inter alia, the trust's original no contest clause, named Cadena as trustee of the entire trust, and basically left the entire trust estate to Cadena. Wise joined Cadena's petition to enforce no contest clause.

(d) The Anti-SLAPP Motion and Related Filings

On June 27, 2019, Vose filed the anti-SLAPP motion that is the subject of this appeal; Castaneda joined Vose's anti-SLAPP motion. The motion papers stated:

> "Lydia Vose is a beneficiary and legally designated successor trustee of the Andrew V. Negrete and Ruth O. Negrete 1987 Trust (the 'Trust'). Irene Castaneda is also a beneficiary of the Trust. Both of these individuals have been sued in this action by Mikaela Cadena because they brought a Petition and civil action against her and the Trust to challenge the amendments through which Ms. Cadena claims the authority to act as trustee of the Trust. Since Ms. Cadena's Petition seeks to recover from Ms. Vose and Ms. Castaneda based on the exercise of their right to petition the courts it is subject to a special motion to strike under Code of Civil Procedure section 425.16.
>
> "Under Section 425.16, once the respondents meet their burden of proving that the action is based on the exercise of their right to petition, the burden then shifts to Ms. Cadena to show that she has a probability of prevailing on the claim. Ms. Cadena will not be able to meet this burden because the amendment to the Trust containing the no-contest clause was not made in conformity with the terms of the Trust and is therefore not enforceable as a matter of law. As such, this motion should be granted, the Petition to Enforce the No Contest Clause must be dismissed with prejudice and Ms. Cadena must be ordered to pay the moving party's attorney fees and costs."

The motion papers further stated:

> "As set forth in the Petition, Andrew and Ruth Negrete created the Trust in 1987.… They jointly amended the trust two times, in January and

> April 2003.… Ruth then passed away on May 4, 2003.… At the time Ruth passed away, Andrew became the sole trustee of the Trust.… After Ruth's death, Andrew Negrete proceeded to unilaterally amend the Trust five times.… The no-contest clause that is the subject of Ms. Cadena's Petition is found in the third and fourth amendments. [¶] All of the [unilateral] amendments, including the third and fourth, are not enforceable. This is because the Trust could no longer be amended or revoked after Ruth's death pursuant to paragraph C of Article IX of the Trust documents. [¶] … [¶]
>
> "Pursuant to Probate Code section 15402, the trust provisions control and govern the ability and method [by] which the Trust could be amended. (*King v. Lynch* (2012) 204 Cal.App.4th 1186, 1193.) The purported third and fourth amendments were invalid and ineffective at their inception because the right to amend was personal to each trustor, the Trust could only be amended during their joint lifetimes and then, only in a writing signed by both settlors … The third and fourth amendments were not signed by Ruth and they were not executed by Andrew until [well after Ruth's death] … The import of these facts is that the purported amendments to the Trust had no legal effect because the amendments were not made in conformity with the mandated requirements of the Trust. The requirements for amending the Trust could not be defeated simply by ignoring them. There is no authority that would permit or authorize Andrew, in any capacity, to amend the Trust in any manner not provided for in the Trust. Therefore, since the amendments were not made in Ruth's lifetime and she could not and did not sign the writings, they are not enforceable. [¶] … [¶]
>
> "The Petition through the pled facts and the attached exhibits admits that the alleged Third through Seventh Amendments were unilaterally made after Ruth's death and do not contain her signature. Simply put they did not comply with the mandated requirements of the Trust and are therefore not effective. Given these facts and the law governing this Court, there is no probability that Ms. Cadena will prevail on her claim to enforce the no contest clause found in alleged amendments." (Fn. omitted.)

Vose's arguments were based on the language of the trust instrument. The trust instrument addressed revocation and amendment in Article IX, paragraphs (A) and (C). These paragraphs appear to apply to revocation and amendment of the trust as a whole and specify that revocation and amendment may only occur during the settlors' joint lifetimes. The trust instrument further provides, in Article IX, paragraph (B), that

"[r]evocation and amendment shall be made in the manner provided in paragraphs A and C of this Article IX."

Cadena filed an opposition to Vose and Castaneda's anti-SLAPP motion.[6] Cadena did not dispute that her petition to enforce no contest clause was based on Vose and Castaneda's petitioning activity but argued that she had a probability of prevailing on the claims in her petition.

Cadena argued that Vose and Castaneda were precluded from arguing, in their anti-SLAPP motion, that Cadena would be unable to show a probability of prevailing on her petition to enforce no contest clause/disinheritance petition because Andrew's unilateral amendments, specifically the Third and Fourth Amendments, which contained the no contest clause at issue, were invalid. More specifically, Cadena argued that Vose and Castaneda's argument to this effect amounted to a challenge to the validity of the trust instrument that could only have been mounted within the 120-day period for bringing a trust contest following receipt of the Probate Code section 16061.7 notice provided by the trustee. (See Prob. Code, § 16061.7 [requiring trustee to serve notification, inter alia, whenever a trust or portion thereof becomes irrevocable upon the death of a settlor or whenever there is a change of trustee of an irrevocable trust]; see also Prob. Code § 16061.8 [any person upon whom a notification by trustee pursuant to Prob. Code § 16061.7 is served must bring any action to contest the trust within 120 days from the date of service of the notification].)

Cadena suggested that Vose's initiating petition of July 2, 2018, which was filed within the 120-day window, had merely contested the application of the Third through Fifth Amendments to the Residual Trusts, without challenging their validity. Cadena

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6 Wise also filed an opposition to Vose and Castaneda's anti-SLAPP motion. Wise's opposition largely adopted and joined in the arguments made in Cadena's opposition.

contended: "Because these issues were not raised within the proper limitations period, they were waived by Vose and Castaneda. Cadena is likely to prevail on the underlying claim because Vose and Castaneda are time barred to raise their challenge to the instruments containing the no contest clause."

In addition, Cadena argued that Andrew properly executed the Third through Seventh Amendments to the trust after Ruth's death, at least with respect to the Survivor's Trust, and that therefore the no contest clause added to the trust instrument by way of Andrew's unilateral amendments could in turn properly be enforced to disinherit Vose and Castaneda, at least with respect to Andrew's interest in the community property held by the trust. Cadena relied on language in the trust instrument, in Article IX, paragraph (B), that indicates that, after the death of one settlor, the surviving settlor may revoke or amend the Survivor's Trust, while the Residual Trusts become irrevocable. (Trust, Article IX (B).) Cadena cited Probate Code section 15402, which provides that unless the trust instrument provides otherwise, a trust that is revocable by the settlor may be amended by the same method by which it may be revoked. The trust instrument, however, does not specifically delineate the method by which the Survivor's Trust may be revoked or amended. Rather, it provides, in Article IX, paragraph (B), that "[r]evocation and amendment shall be made in the manner provided in paragraphs A and C of this Article IX." The methods for revocation and amendment delineated in Article IX, paragraphs (A) and (C), appear to apply only to revocation and amendment of the trust as a whole and specify that revocation and amendment may only occur during the settlors' joint lifetimes.

Cadena also asked the probate court to take judicial notice of documents from Andrew's trust attorney (Larry Cox) that Cadena had filed with the court as part of the related litigation pending in the court. Specifically, Cadena asked the court to take judicial notice of "Larry R. Cox's Declaration [along with exhibits] in Support of

Opposition to Preliminary Injunction filed on May 28, 2019 in Case No. BPB-18-002681." The court granted the request for judicial notice but sustained Vose's objections to several parts of the declaration.

Cox's declaration stated that in October 2010, Andrew informed him that "he desired to amend the Trust to specifically devise his and Ruth's real properties to some of their children, with each identified child [to] receive various properties outright and free of the Trust." Cox further stated: "I informed Andrew … that his suggested disposition was not permissible under the terms of the Trust following Ruth's passing, because her desires as to what was to be done with her interest in the Trust were now irrevocable." Cox added: "Andrew advised me that he wanted to proceed with his … idea of simply amending the Trust." Cox continued: "I suggested to Andrew that if he was committed to amending the Trust, that we should consider adding a stronger disinheritance clause in an effort to dissuade his children from contesting his amendment. Andrew agreed. In short, the intent of the no contest clause was to disinherit any contestant that later claimed Andrew inappropriately amended the Trust." Cox's declaration stated that Andrew thereafter made the other unilateral amendments to the trust, including the Fourth Amendment, with Cox again reminding "Andrew that Ruth's instructions as to her share of the Trust assets became irrevocable following her death," but Andrew chose to proceed with the amendments anyway, without "following the terms of the Trust as to Ruth's one-half interest therein."

Attached to Cox's declaration were letters he had written to Andrew at the time Andrew opted to make various unilateral amendments. In the letters, Cox memorialized his warning to Andrew that the unilateral amendments purported to affect not just Andrew's share of the trust's assets but also Ruth's share, despite the fact that upon Ruth's "passing in 2003," her "portion of this trust became unchangeable." Cox also wrote: "I will prepare a new disinheritance clause for your review and consideration. I

will write it in a much stronger fashion. Hopefully, this will eliminate the possibility of a contest."

Vose filed a reply brief to Cadena's opposition. Vose's reply brief contended:

> "Since the Opposition does not contest the fact that the petition is premised on petitioning activity, this should be viewed as a concession that [Vose and Castaneda] have met their burden of establishing the first element required under Code of Civil Procedure section 425.16(b)(1). Based on this concession, the burden shifted to Ms. Cadena to show that she has a probability of prevailing on the claim by showing that the petition is both legally sufficient and supported by evidence sufficient to make a *prima facie* showing of facts that would sustain a favorable judgment. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89.) If she cannot carry her burden, the petition must be stricken under the statute. (*Navellier, supra*, 29 Cal.4th at 89.) Here, Ms. Cadena has failed to meet her burden.
>
> "In order for her to prove that there is a valid 'no contest' clause that can be enforced against Ms. Vose, Ms. Cadena had to show that the clause upon which her Petition is based met the requirements of Probate Code section 21311. Under this section, a no contest clause can only be enforced against the following:
>
> " '(1) A direct contest that is brought without probable cause.
>
> " '(2) A pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.
>
> " '(3) The filing of a creditor's claim or prosecution of an action based on it. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.'
>
> "Ms. Cadena's Opposition does not provide any evidence or argument addressing any of the statutory pre-requisites to maintaining her action. Although she references the Petition and Complaint filed by Ms. Vose, she does not provide any evidence that said actions were filed without probable cause. Her petition is silent on this issue. Similarly, the opposition is silent as to any facts showing that there is a claim that property transferred by the trust was not the property of the trust at the time [of] transfer and there is no evidence that Ms. Vose ever filed a creditor's claim. As such, Ms. Cadena has failed to provide this court with any

> evidence showing the existence of any facts satisfying the pre-requisites of Probate Code section 21311 and has thus failed to meet [her] burden of showing that the Petition is legally sufficient and factually substantiated. (*Key v. Tyler* (2019) 34 Cal.App.5th 505, 515.) The arguments advanced by [Cadena] do not save the opposition from these omissions."

Vose's reply brief also addressed Cadena's arguments that Vose was time barred from putting in question the validity of Andrew's unilateral amendments and that Andrew properly amended the trust, after Ruth's death, under the terms of the trust. As to Cadena's argument that Vose was precluded from raising the issue of the validity of Andrew's unilateral amendments in connection with her anti-SLAPP motion, Vose contended:

> "The Petitioner in this matter [Cadena] confuses affirmative pleadings seeking relief with the defense to the claims in her petition [to enforce no contest clause]. Specifically, [Cadena] argues that Ms. Vose's claims are barred by Probate Code section 16061.8.… From reading Section 16061.8, it is clear on its face that the statute only applies to 'bringing an action.' It does not create a waiver and it does not bar the ability of a person sued under void and unenforceable trust amendments from asserting the invalidity of the amendments as defense to claims brought against them that rely on the invalid and unenforceable amendments.
>
> "In an effort to make their argument under Probate Code section 16061.8, the Opposition cites to separate pleadings previously filed by Ms. Vose. In an effort to create their waiver argument, Ms. Cadena affirmatively claims that the Petition and Complaint, in their present state, do not attack the validity of the trust amendments.… This argument is contradicted by [her] actual Petition [to enforce no contest clause], which provides:
>
> " '[Vose's] Probate Petition challenges the application of the Third Through Sixth Amendments to the assets formerly owned by Ruth Negrete, <u>claims that Andrew improperly amended the Trust</u> and indirectly claims that a substantial portion of the Trust assets are not subject to the power of Andrew Negrete to modify or alter the disposition thereof.'
>
> "Thus, the arguments relating to … Probate Code section 16061.8 are misplaced as: 1) this is a motion directed at Ms. Cadena's Petition

only; and 2) the Petition of Ms. Vose was timely filed pursuant to Probate Code section 16061.8." (Emphasis in original.)

Finally, with regards to Cadena's argument that Andrew's unilateral amendments were properly made under the terms of the trust, Vose's reply brief contended:

> "What is being proffered to this Court is essentially that the trustee can ignore the terms of the Trust, i.e., the splitting into two separate trusts [the Residual Trusts and the Survivor's Trust]; and because the trust does not prohibit amendments to the trust that is no longer supposed to exist, the surviving spouse is free to amend as he pleases, including changing all of the dispository provisions made by the deceased trustor without her knowledge or consent. This is contrary to the laws governing trust administration and it is contrary to public policy. [¶] … [¶] If the 1987 Trust has remained as is contended by Ms. Cadena, then the right to amend reverts to the limitation imposed on that trust, i.e., the Trust could only be amended during the joint lifetime of the trustors and then, only in a writing signed by both settlors[, as set forth in Article IX of the Trust]. There is no other interpretation that does not ignore and destroy the testamentary intent of Trustor Ruth Negrete. Therefore, since the amendment creating the no contest clause relied upon by Ms. Cadena's [petition] was not made in Ruth's lifetime and it does not contain her signature, it is not enforceable and this motion must be granted."

(e) The Probate Court's Ruling on the Anti-SLAPP Motion

Vose and Castaneda's anti-SLAPP motion proceeded to hearing on July 29, 2019, with a further hearing held on July 31, 2019. The probate court issued a ruling and order granting the anti-SLAPP motion on August 26, 2019. In its ruling, the probate court found, as a preliminary matter, that the motion was timely filed under the anti-SLAPP statute, section 425.16, subdivision (f). Cadena and Wise have not challenged the court's timeliness determination.

The court next addressed whether Cadena's motion to enforce no contest clause arose from an act in furtherance of a protected activity. In this context, the court ruled:

> "The threshold showing required of the moving party, respondent Lydia Vose, is that the act which resulted in the filing of the underlying petition to enforce no contest clause fits one of the categories of a 'protected activity' as set forth in CCP § 425.16(e). See, *Nevellier v.*

Sletten (2002) 29 Cal.4th 82, 88. In this instance there is little room for doubt that Lydia Vose has met this burden. [¶] The court finds that the petition of Mikaela Cadena to enforce the no contest clause, is a petition which arises from the act of Lydia Vose filing her initiating petition with the court and/or the act of filing the civil complaint in the consolidated case. Therefore, the petition to enforce the no contest clause arises from a writing made before a judicial proceeding, a protected activity according to the language of CCP § 425.16(e)(1)."

Finally, the court addressed whether Cadena had established a probability of success on her petition to enforce no contest clause. The court ruled against Cadena on this point. Specifically, the court ruled:

"In order to avoid having her petition to enforce no contest clause be subject to a motion to strike under CCP § 425.16, Mikaela Cadena must establish a 'probability that [she] will prevail on the claim.' CCP § 425.16(b)(1). To make this showing, Mikaela Cadena must demonstrate that her petition is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment, provided the evidence submitted is credible. If either requirement is not met, the motion to strike must be granted; if both are satisfied, the motion must be denied. [Citations.]

"In deciding this issue, the court accepts as true the evidence provided by the petitioner and must determine whether such evidence meets the level of 'minimal merit' to avoid the motion to strike. See *Trapp v. Naiman* (2013) 218 Cal.App.4th 113, 119. As to the opposing evidence of the moving party, the court evaluates such evidence only to the extent of determining if it has defeated the evidence presented by the petitioner, as a matter of law. See, *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.

"In opposition to the instant motion, Mikaela Cadena urges that she had made the requisite prima facie showing. She contends that the no contest clauses set forth in the third and fourth amendments to the trust both contain sufficient definitions as to what constitutes a contest so as to support a finding that the petition and civil case both violate such no contest clauses. However, this argument misses the mark. It is apparent that the no contest clause anticipated a problem with the fact that the amendments made by the surviving co-trustor were not authorized under the terms of the trust. Instead of making amendments which *were* authorized under the terms of the trust, it was apparently decided that such

amendments could be violative of the terms of the trust, but would still be protected by adding a carefully worded no contest clause which would prohibit any challenge to their validity.

"Mikaela Cadena also urges the court to find that Lydia Vose failed to timely contest the validity of amendments 3-7 to the trust (i.e., that Lydia Vose failed to contest such validity within the 120-day limit imposed under Probate Code § 16061.8). In making this claim, it is argued that the initiating petition (which was filed within the 120-day time limit) did not contest the validity of the trust amendments. This claim appears to be somewhat disingenuous.

"The first claim for relief in the initiating petition filed July 2, 2018, seeks to determine the validity of trust provisions under Probate Code section 17200(b)(3) as they relate to the modification of the trust provisions under Probate Code section 17200(b)(13). This first claim for relief delineates that such amendments (3-6) cannot do what they purport to do and seeks an order that such modifications, to the extent they are found to be valid at all, are only valid as they relate to the survivor's trust assets.

"Finally, the relief sought by the original petition included the following: 'An order declaring that, to the extent that the purported amendment of the manner in which the trust assets are to be distributed to the beneficiaries pursuant to the third through the sixth amendments had the effect of purportedly modifying the manner in which the assets of the residual trusts were to be distributed, such purported amendments are *null and void* and the distribution of the assets of the residual trusts shall be as provided pursuant to Article VIII of the second amendment to the trust.' Thus, requesting an order declaring the amendments to be *null and void*.

"The defense of invalidity presented by Lydia Vose appears to defeat petitioner's claim and reveals the invalidity of the proffered amendments which include the no contest clause which is at issue on consideration of the instant petition.

"In light of the foregoing, the court finds that [there is merit] to the contention of Lydia Vose, i.e., that the amendments which included the no contest clause sought for enforcement by Mikaela Cadena's petition, were not authorized under the terms of the Andrew V Negrete and Ruth O Negrete 1987 Trust and were, therefore, void. Under these circumstances, petitioner Mikaela Cadena cannot establish the probability of success on her petition to enforce the no contest clause.

> "Based on the foregoing findings, the court grants the motion to strike filed on behalf of Lydia Vose and the petition to enforce the no contest clause is stricken in its entirety."

(f) Analysis

As discussed above, with respect to the first prong of the anti-SLAPP analysis, we concluded, just like the probate court, that Cadena and Wise's petition to enforce no contest clause/disinheritance petition arose from protected petitioning activity. This finding shifted the burden to Cadena and Wise to establish a probability of prevailing on their motion to enforce no contest clause/disinheritance petition. As to this, second prong of the anti-SLAPP analysis, we are again in sync with the probate court. For reasons set forth below, we conclude that Cadena and Wise have failed to establish a probability of prevailing on their petition to enforce no contest clause/disinheritance petition. We therefore affirm, in its entirety, the probate court's ruling granting Vose and Castaneda's anti-SLAPP motion and dismissing Cadena and Wise's disinheritance petition.

(i) Terms of the Trust

Cadena and Wise's disinheritance petition essentially sought to disinherit Vose and Castaneda completely with respect to the assets of the trust, through enforcement of identical no contest clauses added to the trust instrument by the Third and Fourth Amendments unilaterally made by Andrew after Ruth's death. Cadena and Wise have not, however, established that the no contest clauses unilaterally added by Andrew years after Ruth's death could operate to completely disinherit Vose and Castaneda with respect to the trust's assets, in contravention of Ruth's instructions as reflected in the trust terms.

When the interpretation of a will or trust does not turn on the credibility of extrinsic evidence, our review is de novo; here, there is no question raised as to the credibility of any extrinsic evidence, hence we will independently interpret the trust language. (*Burch v. George* (1994) 7 Cal.4th 246, 254-255.)

Preliminarily, we note that Vose and Castaneda argue that Cadena and Wise did not introduce into evidence before the probate court, properly authenticated versions of the original trust instrument and Andrew's unilateral amendments, whereby they automatically failed to show, by means of any actual, admissible evidence, the probability that they would prevail on their disinheritance petition. (See *Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714 [in context of anti-SLAPP motion, plaintiff " ' "must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment" ' "].) However, Vose and Castendeda did not make this argument in the trial court and have forfeited it for purposes of appeal. We will therefore address the terms of the trust (as the probate court did in ruling on the anti-SLAPP motion). (See *Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603 [" 'issues not raised in the trial court cannot be raised for the first time on appeal' "]; *Morgan v. Imperial Irrigation District* (2014) 223 Cal.App.4th 892, 913 ["[a]s a general rule, an appellate court will not review an issue that was not raised by some proper method by a party in the trial court"].)

Under the terms of the trust, upon the death of either settlor, the trust was to divide into the Survivor's Trust and two Residual Trusts, with the latter trusts becoming irrevocable. Under the terms of the trust, after the death of one settlor, only the Survivor's Trust would be subject to revocation and amendment by the surviving settlor. Ruth died first, in 2003, requiring the creation of the Survivor's Trust and the Residual Trusts, with the latter becoming irrevocable. Thereafter, the trust, as a whole, could no longer be amended or revoked by Andrew, the surviving settlor. The trust instrument listed Vose and Castaneda, among others, as remainder beneficiaries of the trust, and upon Ruth's death, they accordingly gained their irrevocable interests in the Residual Trusts.

Several years after Ruth's death, Andrew purported repeatedly to amend the entire trust. The fact that he did not allocate the trust's assets into three new trusts as required by the trust instrument prior to executing the amendments indicates that he intended to amend the trust as a whole. He was told by Larry Cox, the attorney who had drafted the original trust as well as Andrew's unilateral amendments, that the latter amendments were not authorized by the terms of the trust and, at a minimum, would not extend to the portion of the trust that became irrevocable upon Ruth's death. Andrew went ahead and executed the amendments anyway, changing, as to all the trust's assets, the disposition plan set forth in the original trust instrument.

The original trust contained a no contest clause in Article XVI. This no contest clause was also applicable to the three new trusts to be formed upon the death of one of the settlors. (See *Fazzi v. Klein* (2010) 190 Cal.App.4th 1280, 1285 [husband and wife formed trust that was revocable during their joint lifetimes, precluding the possibility of a "contest" when both settlors were alive; no contest clause in trust instrument would obviously apply to new sub-trusts, A, B, and C, to be formed on death of one of the settlors because it was only upon the death of one of the settlors, when the remainder beneficiaries gained their irrevocable interests in trusts B and C, that the possibility of a "contest" posed a risk to the trustors' plan for the assets placed in trust].) Andrew unilaterally sought to amend Article XVI, the original no contest clause, after Ruth's death. However, the Residual Trusts became irrevocable on Ruth's death and Andrew could no longer execute amendments as to those trusts. Therefore, Andrew's Third and Fourth Amendments that purported to amend Article XVI of the trust instrument, did not extend to the Residual Trusts and were either void or, at best, modified the existing no contest clause as to only the Survivor's Trust.

In their disinheritance petition, Cadena and Wise seek to enforce the no contest clause contained in Andrew's unilateral Third and Fourth Amendments. Specifically,

they claim: "As a result of filing [their] Probate Petition both Lydia Vose and Irene [Castaneda] have violated Article XVI of the Trust and are entitled to the sum of One Dollar ($1.00) *and no more* from the assets of the Trust." (Italics added.) As to Vose, Cadena and Wise further contend that Vose's civil complaint "violate[s] Article XVI of the Trust and Vose is entitled to the sum of One Dollar ($1.00) *and no more* from the assets of the Trust." (Italics added.) Cadena and Wise in turn seek, in their disinheritance petition, an order as follows: "That Lydia Vose violated Article XVI of the Trust by her filing of the Probate Petition and is entitled to the sum of One Dollar ($1.00) *and no more* from the Trust." (Italics added.) Cadena and Wise seek a similar order as to Irene Castaneda. Cadena and Wise also seek an order, as to Vose, to the effect that "Lydia Vose violated Article XVI of the Trust by her filing of the Civil Complaint and is entitled to the sum of One Dollar ($1.00) *and no more* from the Trust." (Italics added.) Even assuming the no contest clause, by its terms, applies to the pleadings filed by Vose and Castaneda (an issue the parties do not address), Cadena and Wise have failed to show a probability that they will prevail on the *specific* claims in their petition.

First, in their initiating pleadings, Vose and Castaneda have challenged only Andrew's unilateral amendments, not any provisions of the original trust. In turn, Cadena and Wise do not allege, and have not attempted to show, that Vose and Castaneda, by virtue of filing their probate petition, and in the case of Vose, her civil complaint, violated the no contest clause in the original trust instrument (indeed, the original no contest clause does not state it applies to challenges to subsequent amendments or that contests to subsequent amendments would result in a forfeiture). (See *Scharlin v. Superior Court* (1992) 9 Cal.App.4th 162, 170-171 (*Scharlin*) [married couple formed trust with no contest clause; upon husband's death, trust divided, per the terms of the trust, into a revocable survivor's trust and an irrevocable decedent's trust;

wife thereafter could properly amend the no contest clause as to the survivor's trust but not as to the irrevocable decedent's trust; the irrevocable decedent's trust was controlled by the no contest clause in the *original* trust agreement, which did not cover contests of subsequent amendments].) Under *Scharlin*, Andrew's unilateral amendments to Article XVI of the trust could not amend the original no contest clause with respect to the entire trust, i.e., the Survivor's Trust *as well as* the Residual Trusts, *as Andrew intended and attempted to do*. Therefore, Andrew's Third and Fourth Amendments are either void, or, at best, amended the original no contest clause as to only the Survivor's Trust.

The same conclusion is required under the trust provisions governing amendment of the trust. The trust instrument provides that after the death of a settlor, only the Survivor's Trust may be amended. (Trust, Article IX (B).) While the trust instrument is ambiguous as to how the Survivor's Trust could be amended, the instrument is clear that the trust as a whole could only be amended during the settlors' joint lifetimes. (Trust, Article IX (C).) Here, Andrew purported to amend the trust *as a whole*, as signified by the fact that he failed even to formally create, by appropriately allocating assets, the sub-trusts envisioned in the trust instrument. Andrew also ignored the advice of his attorney, Larry Cox, to the effect that he could not amend the Residual Trusts. Accordingly, Andrew's amendments are either void, or, at best, they are limited to the Survivor's Trust.

It follows that, to the extent the no contest clause in the Third and Fourth Amendments is enforceable at all, it would only be enforceable with respect to the assets that are properly allocated to the Survivor's Trust. (See Rest.3d Trusts, § 96(2) ["A no-contest clause shall not be enforced to the extent that doing so would interfere with the enforcement or proper administration of the trust."]; also see Bogert's The Law of Trusts and Trustees, § 181 [same].) In other words, Cadena and Wise have not shown that the

no contest clause in the Third and Fourth Amendments, even if enforceable, would serve to disinherit Vose and Castaneda with regard to their interests in the Residual Trusts.[7]

In their petition to enforce the no contest clause/disinheritance petition, however, Cadena and Wise specifically seek orders limiting Vose and Castaneda to "One Dollar ($1.00) *and no more*" from the assets of the trust, on account of filing the probate petition of July 2, 2018, and, in Vose's case (as trustee of the Residual Trusts), the civil complaint. (Italics added.) In light of the terms of the trust, Cadena and Wise have not shown that Vose and Castaneda would be limited to "One Dollar ($1.00) *and no more*" from the *entire* trust estate. (Italics added.) In turn Cadena and Wise have failed to show a probability of prevailing on their disinheritance petition.[8]

In so far as Cadena and Wise argue that their disinheritance petition would succeed to the extent Vose and Castaneda would be disinherited at least as to the Survivor's Trust, that argument fails because Cadena and Wise did not seek such relief in their disinheritance petition. On the contrary, Cadena and Wise's disinheritance petition specifically asks for orders limiting Vose and Castaneda to "the sum of One Dollar ($1.00) and no more" from the *entire* trust estate. As noted above, Cadena and Wise

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7 Indeed, Cadena and Wise's opposition to Vose and Castaneda's initiating petitions and/or attempt to disinherit Vose and Castaneda from their irrevocable interests in the Residual Trusts could potentially violate the no contest clause in the original trust instrument (to the extent enforceable under Probate Code section 21311–see below), as an unsuccessful opposition to a contest sometimes can itself constitute a contest if the instrument being contested purports to amend or replace a protected instrument (here, the original trust or the Residual Trusts). (See *Key, supra,* 34 Cal.App.5th 505 [unsuccessful opposition to an undue influence contest of a trust amendment was direct contest of the original trust]; *Estate of Gonzalez* (2002) 102 Cal.App.4th 1296 [offering later will procured by undue influence constituted a contest of an earlier will the later will purported to replace and violated the no contest clause contained in the earlier will].)

8 Cadena and Wise's disinheritance petition also seeks an order limiting Vose and Castaneda to $1.00 each from Andrew's estate. However, Andrew's will left his estate to the trustees of the trust, for distribution "as part of that trust, according to the terms of that trust."

have failed to show a probability of prevailing on their claim that Vose and Castaneda must be limited to "the sum of One Dollar ($1.00) *and no more*" from the entire trust estate. (Italics added.)

Furthermore, in light of the trust terms and Cadena and Wise's concessions that Andrew failed to administer properly the trust, and intended to amend improperly the trust as a whole (Ruth's wishes and instructions notwithstanding), Vose and Castaneda are likely to prevail on their claims to the extent the latter seek, at bottom, the proper interpretation, reformation, or administration of the trust. This is another reason that Cadena and Wise have not shown that Vose and Castaneda would be completely disinherited from the entire trust estate on account of bringing these claims. (See *Donkin v. Donkin* (2013) 58 Cal.4th 412, 426, 433-434 (*Donkin*) [a beneficiary should not be punished for bringing an action to ensure the proper interpretation, reformation, or administration of an estate plan or trust]; *Urick*, *supra*, 15 Cal.App.5th at p. 1193 [" 'as a matter of general public policy, "a person should have access to the courts to remedy a wrong or protect important rights" ' "].)

In addition, as discussed below, the no contest clauses unilaterally added by Andrew in the Third and Fourth Amendments are not enforceable under Probate Code section 21311.

In sum, Cadena and Vose have not shown a probability of prevailing on their disinheritance petition.

(ii) Probate Code Section 21311

"Effective January 1, 2010, the Legislature repealed former [Probate Code] sections 21300 through 21308 (General Provisions) and former [Probate Code] sections 21320 through 21322 (Declaratory Relief) and enacted a major revision of the statutory scheme governing no contest clauses. (See [Prob. Code,] §§ 21310-21315.) The new law limits the enforceability of no contest clauses to only three types of claims: (1) direct

contests brought without probable cause; (2) challenges to the transferor's ownership of property at the time of the transfer if expressly included in the no contest clause; and (3) creditor's claims and actions based on them, if expressly included in the no contest clause. ([Prob. Code,] § 21311, subd. (a); see also *Johnson v. Greenelsh*[, *supra,* 47 Cal.4th at p. 601, fn. 2].) This new statutory scheme applies only to instruments that became irrevocable on or after January 1, 2001. ([Prob. Code,] § 21315.)" (*Fazzi v. Klein*, *supra,* 190 Cal.App.4th at p. 1283, fn. 2.) Here, the Residual Trusts became irrevocable in 2003, and therefore the new law applies for purposes of assessing the enforceability of the no contest clauses at issue.

"[Probate Code section] 21311, subdivision (a), of the current law provides in full as follows: 'A no contest clause shall *only* be enforced against the following types of contests: [¶] (1) A direct contest that is brought without probable cause. [¶] (2) A pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application. [¶] (3) The filing of a creditor's claim or prosecution of an action based on it. A no contest clause shall only be enforced under this paragraph if the no contest clause expressly provides for that application.' (Italics added.) [¶] The effect of this statute is to make the trust's no contest clauses unenforceable unless the beneficiaries' proposed action is covered by one of the three specified categories of contest." (*Donkin*, *supra,* 58 Cal.4th at p. 430 [under the new law, " 'any pleading that is not one of the expressly covered types would not be governed by a no contest clause' without the need for further analysis"].)

In *Donkin,* our Supreme Court explained that the new law narrowed the types of pleadings that would trigger no contest clauses in wills and trusts because of confusion created by the previously-existing " 'open-ended definition of "contest," combined with a complex and lengthy set of [public policy] exceptions' " to the enforcement of no contest

clauses. (*Donkin*, *supra*, 58 Cal.4th at pp. 425-426.) *Donkin* explained that among the various types of contests were " 'direct contests' " and " 'indirect contests.' " "A 'direct contest' was defined as a pleading in a court proceeding that alleged 'the invalidity of an instrument or one or more of its terms' based on [specified, statutory] grounds, including, inter alia, revocation, lack of capacity, fraud, undue influence, lack of due execution, and forgery. (Former Prob. Code, § 21300, subd. (b).)" (*Donkin*, *supra*, at p. 423.) An " ' "[i]ndirect contest" ' was defined as a pleading 'that indirectly challenges the validity of an instrument or one or more of its terms based on any other ground not contained in [the statutory list of direct contests].' (Former [Prob. Code,] § 21300, subd. (c).)" (*Id.* at pp. 423-424.) *Donkin* explained: "Reading the former statute and the applicable common law together, we described an indirect contest as 'one that attacks the validity of an instrument by seeking relief inconsistent with its terms.' " (*Id.* at p. 424.)

Donkin noted that the new law, Probate Code section 21311, subdivision (a), eliminated enforcement of a no contest clause against an indirect contest. The Legislature commissioned a report in 2008 from the California Law Revision Commission (Commission) on the issue of needed updates to the prior law concerning no contest clauses. Among other conclusions, the Commission noted that most indirect contests were already exempted from the enforcement of no contest clauses because of public policy considerations. The Commission therefore recommended elimination of enforceability of no contest clauses against indirect contests. Specifically, the Commission's report stated: " 'The policy implication of that trend is clear. A beneficiary should not be punished for bringing an action to ensure the proper interpretation, reformation, or administration of an estate plan. Such actions serve the public policy of facilitating the fair and efficient administration of estates [and trusts] and help to effectuate the transferor[s]' intentions.… [¶] The proposed law would merely

extend that principle to its logical end.' " (*Donkin, supra,* 58 Cal.4th at p. 426.) The Legislature adopted the Commission's recommendation in the new law. (*Ibid.*)

Cadena and Wise do not contend that Vose and Castaneda's pleadings constitute a "direct contest" under the current law. (Prob. Code, §§ 21310, subds. (a) & (b), 21311, subd. (a)(1).) Rather, Cadena and Wise contend that Vose and Castaneda's challenges assert a claim under Probate Code section 21311, subdivisions (a)(2), which addresses claims regarding property ownership and characterization disputes in connection with a property transfer, and (a)(3), which addresses creditor's claims. Cadena and Wise suggest that Vose and Castaneda's claims challenge a transfer of property effected by Andrew, on the ground that Andrew did not own the property at the time of the transfer. Cadena and Wise further suggest that Vose and Castaneda's claims are creditor's claims, as they seek to enforce distributions from the trust. Cadena and Wise argue that, therefore, the no contest clauses in Andrew's unilateral Third and Fourth Amendments are enforceable under current law. We conclude the no contest clauses are not enforceable under the terms of Probate Code section 21311, subdivisions (a)(2) and (a)(3).

Donkin explains the legislative background of Probate Code section 21311, subdivision (a)(2):

> "[T]he current law was enacted upon the recommendation of the Commission after the Commission reflected and reported on the respective advantages and disadvantages of enforcing a no contest clause. Among the issues considered by the Commission was the historic use of a no contest clause to resolve disputes over the character of the property being transferred—in essence, the extent of the transferor's ownership of the property. In its 2008 report, the Commission explained that '[i]n some cases, the proper disposition of a transferor's property may be complicated by difficult property characterization issues.' [Citation.] The Commission gave as an example a situation in which successive marriages resulted in difficult community property characterization issues, which could be avoided by forcing the surviving spouse to make a choice between accepting an amount offered through the decedent's estate plan or pursuing

> his or her independent community property claim. [Citation.] As another example, the Commission noted that 'business partners may have mingled assets in a way that would make proper division difficult ….' [Citation.] In such cases, the Commission reflected, 'a no contest clause and a sufficiently generous gift can resolve the matter without litigation.' [Citation.] The no contest clause forces the beneficiary to make an election." (*Donkin, supra,* 58 Cal.4th at pp. 430-431.)

As *Donkin* explained, in the context of trusts, Probate Code section 21311, subdivision (a)(2), is usually implicated when the challenger asserts a claim of ownership of assets that were transferred into a trust by the decedent. Indeed, the prior law, former Probate Code section 21305, subdivision (a)(2), which the Commission recommended be continued in the new law, referred to "any 'action or proceeding to determine the character, title, or ownership of property.' " (*Donkin, supra,* 58 Cal.4th at p. 431.) However, the Commission "recommended *narrowing* of the existing statutory language," which recommendation was adopted by the Legislature. (*Ibid.*, italics added.) Thus, under Probate Code section 21311, subdivision (a)(2), a no contest clause can only be enforced against "[a] pleading to challenge a transfer of property on the grounds that it was *not the transferor's property at the time of the transfer*," and only when "the no contest clause *expressly* provides for that application." (Italics added.) *Donkin* noted: "Because there is no ambiguity in the language of [Probate Code] section 21311, subdivision (a)(2), concerning the requirement that the no contest clause expressly provide for its application to forced election challenges, the plain meaning of the language controls." (*Donkin, supra,* 58 Cal.4th at p. 432.)

Here, Andrew's unilaterally-added no contest clauses provide that they apply "if any person, whether beneficiary under the Trust or not mentioned herein shall contest this Trust or the Settlor's Will, directly or indirectly,[9] or make any claim against this trust or the Settlor's estate, directly or indirectly, including, but not limited to":

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9 As noted above, a no contest clause can no longer be enforced against an indirect contest. (*Donkin, supra,* 58 Cal.4th at p. 426; see Prob. Code, § 21311, subd. (a).)

• "a claim that the Settlor Andrew Negrete improperly amended the trust as to any property owned by the trust, including the part formerly owned by the [sic] Ruth O. Negrete";

• "a claim of ownership of any asset of the trust or of the Settlor, or a probate homestead, or a family allowance";

• "a claim that the property should not remain in trust";

• "or a claim that the Settlor had an agreement with any beneficiary herein regarding the ownership of any property or the disposition of any property";

• "or interferes in any manner, directly or indirectly, with the funeral arrangements that the Settlor makes regarding the disposition of his remains." (Trust, Third and Fourth Amendments.)

As noted above, the current law, i.e., Probate Code section 21311, subdivision (a)(2), is *narrower* than the prior law, former Probate Code section 21305, subdivision (a)(2), under which no contest clauses could properly be enforced against any " 'action or proceeding to determine the character, title, or ownership of property,' " when expressly provided in the clause at issue. (See *Donkin, supra*, 58 Cal.4th at p. 431; former Prob. Code, § 21305, subd. (a)(2).) To reiterate, in contrast to former Probate Code section 21305, subdivision (a)(2), Probate Code section 21311, subdivision (a)(2), limits the enforceability of no contest clauses to pleadings that "challenge a transfer of property on the grounds that it was *not the transferor's property at the time of the transfer*," provided "the no contest clause *expressly* provides for that application." (Italics added.) No contest clauses are strictly construed. (Prob. Code, § 21312; *Donkin, supra*, 58 Cal.4th at p. 422.) The no contest clauses in Andrew's Third and Fourth Amendments do not *expressly* apply to pleadings that challenge "a transfer of property on the grounds that it was not the transferor's property *at the time of the transfer*." (Prob. Code, § 21311, subd. (a)(2) (italics added).) Therefore, even assuming *arguendo* that Vose and Castaneda's

claims can be characterized as a challenge to a transfer of property within the meaning of Probate Code section 21311, subdivision (a)(2), the no contest clauses cannot be enforced against such claims. In turn, Andrew's unilaterally-added no contest clauses cannot be enforced under Probate Code section 21311, subdivision (a)(2), to disinherit Vose and Castaneda as to the Trust estate.

Cadena and Wise also contend that the no contest clauses in Andrew's Third and Fourth Amendments were enforceable under Probate Code section 21311, subdivision (a)(3), which provides that no contest clauses are enforceable against "[t]he filing of a creditor's claim or prosecution of an action based on it," provided the no contest clause "expressly provides for that application." However, Cadena and Wise have not shown that Vose and Castaneda filed a creditor's claim; nor have they shown that the initiating pleadings filed by Vose and Castaneda were actions to prosecute creditors' claims. Creditor's claims are generally contractual claims unrelated to the estate or trust, and merely reduce the amount available to the beneficiaries of the estate or trust rather than contesting the decedent's stated plan of distribution. (See *Zwirn v. Schweizer* (2005) 134 Cal.App.4th 1153, 1158, 1160.)

(iii) Probate Code Section 16061.8 Does Not Apply in the Present Context as it is Cadena and Wise's Burden to Establish a Probability of Prevailing on Their Disinheritance Petition

Cadena and Wise make a convoluted argument to the effect that Probate Code section 16061.8 bars Vose and Castaneda from arguing, in their anti-SLAPP motion, that Andrew's Third and Fourth Amendments, which contain the no contest clauses, were invalid and consequently not enforceable against Vose and Castaneda. Probate Code section 16061.8 provides that "an action to contest" a trust must be brought "no more than 120 days" from the date of service of the "notification by trustee." Cadena and Wise argue that Vose and Castaneda had not, in their timely-filed initiating probate petition,

challenged the validity of Andrew's unilateral amendments and, by extension, the enforceability of the no contest clauses therein, and therefore, could not raise these issues in their anti-SLAPP motion. We reject Cadena and Wise's contentions regarding the application of Probate Code section 16061.8.

Cadena and Wise's argument is inapposite because Vose and Castaneda's anti-SLAPP motion was brought in response to Cadena and Wise's disinheritance petition; it does not constitute an independent "action to contest the trust" brought in response to a "notification by trustee" that would be subject to Probate Code section 16061.8. The action at issue is the disinheritance petition, not the anti-SLAPP motion, and the 120-day time limit has no application. Secondly, it is Cadena and Wise's burden to show a probability of prevailing on the cause of action asserted in their disinheritance petition; Vose and Castaneda are free to argue why Cadena and Wise cannot meet their burden. Finally, if Vose and Castaneda have not challenged the validity of the stated amendments in their pleadings, as Cadena and Wise would have it, then Vose and Castaneda have not necessarily contested the provisions of the trust, and the no contest clause would likely be inapplicable under its own terms (especially as Cadena and Wise do not address here the claims by Vose and Castenada that constitute a direct contest, i.e., Vose and Castaneda's claims that the Sixth and Seventh Amendments were procured by undue influence).

In any event, as the probate court found, Vose and Castaneda's initiating probate petition did challenge the validity of Andrew's unilateral amendments, including the amendments containing the no contest clauses. Specifically, the first claim for relief in the initiating petition filed July 2, 2018, sought an order and judgment declaring, to the extent the Third through Sixth Amendments modified the manner in which the trust's assets were to be distributed, that such amendments, if valid at all, related only to the Survivor's Trust. Other relief sought in the petition included the following: "An order declaring that, to the extent that the purported amendment of the manner in which the

trust assets are to be distributed to the beneficiaries pursuant to the Third through Sixth Amendments had the effect of purportedly modifying the manner in which the assets of the Residual Trusts were to be distributed, such purported amendments are null and void and the distribution of the assets of the Residual Trusts shall be provided pursuant to Article VIII of the Second Amendment to the Trust." Thus, the relief requested in the initiating probate petition included an order declaring the amendments to be *null and void*.

To the extent Cadena and Wise further argue that Vose and Castandeda had not previously challenged the validity of the amendments as applied to *Andrew's* (and only Andrew's) interest in the trust estate and cannot do so now, this argument has no merit because, as noted above, Vose and Castaneda had clearly put in issue, in their initiating petition, the questions of the validity and scope of the amendments.

(iv) Conclusion

The trial court properly granted Vose and Castaneda's anti-SLAPP motion. Cadena and Wise do not dispute that Vose and Castaneda met their burden of demonstrating that they were being sued in this matter for petitioning activity related to the trust. Next, Cadena and Wise failed to show a probability of prevailing on their claim to enforce the no contest clauses in Andrew's unilateral Third and Fourth Amendments. We therefore affirm the probate court's order striking the disinheritance petition.

II. Probate Court Properly Assessed Attorney Fees Against Cadena in her Individual Capacity

As the prevailing party on her anti-SLAPP motion, Vose filed a motion for statutory attorney's fees as authorized by the anti-SLAPP statute, section 425.16. The motion proceeded to hearing on November 26, 2019; all concerned parties (Vose, Cadena, Wise) participated in the hearing. The probate court subsequently granted the motion and issued a written ruling and order as follows: "Lydia Vose shall recover

attorney's fees and costs incurred on the special motion to strike under CCP § 425.16 in the amount of $13,889.00, jointly and severally as against Mikaela Cadena, as an individual, and Helen Wise, as an individual."

Cadena appeals the court's ruling. Cadena contends the court erred in imposing the attorney's fees against her individually; she contends the court should have imposed the attorney's fees against her as trustee of the Negrete Trust so as to allow her to pay the fees out of the Trust estate. Wise also appeals the court's ruling on grounds she had inadequate notice of Vose's attorney's fees motion. We affirm.

1. The Probate Court's Ruling on Vose's Motion for Attorney Fees

As noted, the probate court issued a written ruling and order on Vose's motion for attorney's fees. The court's ruling provides:

> "The motion seeks to impose the fee award against Mikaela Cadena and Helen Wise as individuals. Helen Wise specially appeared challenging service of the motion. The Court finds that service of the motion on Helen Wise was proper.
>
> "In opposing the motion for fees Mikaela Cadena alleges that she filed the motion to enforce the no contest clause in her capacity as the successor trustee and therefore, should not be individually liable for the attorney's fees incurred.
>
> "In *Key v. Tyler* (2019) 34 Cal.App.5th 505 ('*Key*'), a similar case wherein a defendant filed a successful motion to strike against a trustee appointed pursuant to invalid trust amendments, the court noted the following with regard to the capacity in which the trustee defended the amendments to the trust: 'It is the effect of [the trustee's] conduct that establishes whether she defended the 2007 Amendment solely in her capacity as a disinterested trustee, not the titles on the pleadings that she filed.' *Key*, supra at 526. The court further found that the SLAPP petition in *Key* was consistent with the trustee's own personal interests as a beneficiary, not with her duty as a trustee to deal impartially with other beneficiaries.
>
> "Similarly, Ms. Cadena's actions in the instant matter, including the petition to enforce the no contest clause and in opposing the special motion

to dismiss were actions undertaken to benefit herself at the expense and to the detriment of the other beneficiaries of the subject trust. As such the court finds that Ms. Cadena is liable individually for the award of attorney's fees on the special motion to strike. The petition to enforce the no contest clause was joined by Helen Wise on June 28, 2019. Therefore, the court finds that Mikaela Cadena, as an individual, and Helen Wise, as an individual, are jointly and severally liable for the award of attorney's fees and costs incurred on the special motion to strike under CCP § 425.16."[10] (Emphasis in original.)

2. Analysis

Vose brought her anti-SLAPP motion in response to a petition to enforce no contest clause filed by Cadena. Cadena's probate petition was pending before the superior court sitting in probate. Therefore, the superior court sitting in probate heard Vose's anti-SLAPP motion to strike Cadena's petition to enforce no contest clause. The court granted Vose's anti-SLAPP motion and struck Cadena's underlying probate

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10 At the hearing on the attorney's fees motion, Vose's attorney made the following point:

> "[G]etting back to where the *Key* case falls into this, it's telling the Court it doesn't matter what [trustees] call themselves on these filings. When [Cadena is] taking actions that benefit herself, personally, as the beneficiary, she's acting as the beneficiary personally. And the *Key* case, I think it had some points that are very much directly on point in this. Because the amendments – when [Cadena] brought a [motion to enforce] no contest clause, she wasn't acting as the trustee to help the trust; she was acting in the capacity of a beneficiary to help herself.
>
> "Because if [Cadena] were able to disinherit or have Ms. Vose and Castaneda taken out of this matter, then they don't have standing to pursue the matter anymore and – guess what? – she gets it all. And that's exactly what she was going for on this, and that's why the *Key* case really has applicability to what's going on before the Court.
>
> "And the idea that [Cadena] can personally bring a [motion to enforce] no contest clause to benefit herself and then claim 'I can withdraw the attorney fees to pay the people [carrying out] my actions out of the trust' is just nonsensical and not warranted by what we're doing here."

petition. Thereafter, Vose brought a motion for attorney's fees pursuant to the anti-SLAPP statute, section 425.16. The court granted the motion, and awarded attorney's fees jointly and severally against Cadena, as an individual, and Wise, as an individual.

Cadena argues the court should have applied section 1026 in determining whether to award attorney's fees against her individually or as an expense of the trust over which she is the putative trustee. Subdivision (a) of section 1026 provides that, in an action prosecuted or defended by fiduciaries such as trustees or conservators, "costs may be recovered as in an action by or against a person prosecuting or defending in the person's own right," except as provided in subdivision (b). Subdivision (b) provides: "Costs allowed under subdivision (a) shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the costs to be paid by the fiduciary personally for mismanagement or bad faith in the action or defense."

By contrast, Probate Code section 1002 provides: "Unless it is otherwise provided by this code or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require."

The instant matter concerns Cadena's petition to enforce no contest clause, brought pursuant to Probate Code section 17200, subdivision (a), which permits a trustee or beneficiary of a trust to bring a petition concerning the internal affairs of a trust; as for the enforceability of the no contest clauses at issue, Probate Code section 21311 governs that issue. The instant proceeding is therefore a probate matter. The rules of practice applicable to civil actions govern proceedings under the Probate Code, except to the extent that the Probate Code provides applicable rules. (Prob. Code, § 1000.) In Probate Code section 1002, the Probate Code establishes rules governing the allocation of liability for costs between fiduciaries and the estates they represent. Accordingly, in proceedings under the Probate Code, Probate Code section 1002 controls over the general

rules concerning costs as set forth in section 1021 et seq. of the Code of Civil Procedure. (*Estate of Olmstead* (1898) 120 Cal. 447, 452 [applying former Code Civ. Proc., § 1720, a predecessor of Prob. Code, § 1002]; see *Hollaway v. Edwards* (1998) 68 Cal.App.4th 94, 99 [although "Code of Civil Procedure section 1032, subdivision (b) entitles a prevailing party in ordinary civil litigation to costs as a matter of right," that is not the case in probate matters, where Probate Code section 1002 provides for an award of costs at the discretion of the probate court].) In particular, in probate matters, Probate Code section 1002 controls over Code of Civil Procedure section 1026.

Probate Code section 1002 expressly leaves the allocation of costs between the parties and the estates to the trial court's discretion. Accordingly, the court's ruling on this point is reviewed for an abuse of that discretion. (*Estate of Denman* (1979) 94 Cal.App.3d 289, 291-292.) Unless the complaining party establishes both a clear case of abuse and a miscarriage of justice, "'an appellate court will not substitute its opinion and thereby divest the trial court of its discretionary power.'" (*Estate of Hart* (1953) 119 Cal.App.2d 310, 318.)

Where, as here, attorney's fees are specifically provided for by statute, they are properly viewed as an item of costs; this is the rule in both probate and civil matters. (*Estate of Gerber* (1977) 73 Cal.App.3d 96, 117; § 1033.5, subd. (a)(10)(B).) Probate Code section 1002 authorizes the trial court to, "*in its discretion*, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require." (Italics added.)

Furthermore, as the probate court noted, *Key*, *supra*, 34 Cal.App.5th at page 526 instructs that it is the "effect of the conduct" of a trustee in the litigation that establishes whether she acted "solely in her capacity as a disinterested trustee," not "the titles on the pleadings that she filed." *Key* also explains that a court can assess whether pleadings filed by a trustee are more consistent with her own interests as a beneficiary or with her

fiduciary duties to deal impartially with all beneficiaries. (*Ibid*.; see *Urick, supra*, 15 Cal.App.5th at p. 1196 [petition filed by trustee was "consistent with her interest as a beneficiary," "not with her fiduciary duties as a trustee to the beneficiaries," and was therefore filed in an individual capacity]; Prob. Code, § 16003 [a trustee is obligated to deal impartially with beneficiaries].)

Here, Cadena acknowledges that Andrew did not properly administer the trust, failing even to allocate assets to the sub-trusts upon Ruth's death as required by the trust instrument. Cadena further acknowledges that Andrew intended for his unilateral amendments to apply to the entirety of the trust estate despite being told by his attorney, Larry Cox, that the Residual Trusts had become irrevocable on Ruth's death. Vose and Castaneda filed their initiating pleadings to ascertain the validity of the amendments and to enforce the rights of the Residual Trusts. However, Cadena—who inherited the vast bulk of the Trust's assets under Andrew's unilateral amendments to the detriment of other beneficiaries—filed the petition to enforce no contest clause/disinheritance petition while the claims brought by Vose and Castaneda were still *pending*, evidently as a means of short-circuiting the resolution thereof. Cadena then opposed the anti-SLAPP motion properly brought by Vose and Castaneda.

The probate court stated in its ruling on Vose's motion for attorney's fees: "Ms. Cadena's actions in the instant matter, including the petition to enforce the no contest clause and in opposing the special motion to dismiss were actions undertaken to benefit herself at the expense and to the detriment of the other beneficiaries of the subject trust. As such the court finds that Ms. Cadena is liable individually for the award of attorney's fees on the special motion to strike." The probate court properly assessed the effect of Cadena's conduct in filing the petition to enforce no contest clause, especially given the timing thereof, and in opposing Vose's ensuing anti-SLAPP motion. The probate court did not make a factual finding that Cadena was not a trustee of the trust as Cadena

suggests. Given the applicable record, the court's ruling that Cadena was individually liable for Vose's attorney's fees was not an abuse of discretion.

We recognize that the probate court believed that the award of attorney's fees and costs in this matter was "subject to the … statutes applicable to a prevailing party's recovery of attorney's fees and costs in a civil action." However, as explained above, although the statutory basis of the attorney's fees was Code of Civil Procedure section 425.16, subdivision (c), the costs statute in the Probate Code (which incorporates statutory attorney fees) applies in this matter. In any event, even were we to assume, for the sake of argument, that the award of costs in this matter is governed by Code of Civil Procedure section 1026, we would reach the same ultimate conclusion, i.e., that the probate court did not abuse its discretion in assessing the attorney fee award against Cadena as an individual. Cadena contends that under Code of Civil Procedure section 1026, any award of attorney's fees against Cadena individually had to be based on a finding, by the probate court, of bad faith on her part. Here, the probate court's ruling and order reflects an implied finding to this effect and its implied finding is supported by substantial evidence. (See *Finney v. Gomez* (2003) 111 Cal.App.4th 527, 545; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115-1116, fn. 6 [we presume the "trial court impliedly found 'every fact necessary to support its order' "].) Accordingly, even under section 1026, we detect no abuse of discretion in the probate court's ruling and order.

Cadena argues for the first time on appeal that her litigation choices were undertaken "in defense of the Trust … at the advice of counsel," and since the trust instrument precludes liability for a trustee who acts on the advice of counsel, Cadena is not liable for attorney fees in her individual capacity. (See Trust, Article X (A)(17).) However, in failing to make this contention in the probate court, Cadena has forfeited it on appeal. (*DiCola v. White Bros. Performance Products, Inc*. (2008) 158 Cal.App.4th

666, 677; *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 685.)

Finally, we address Wise's claims with respect to the probate court's attorney's fees ruling and order. Wise joined Cadena's disinheritance petition and also opposed Vose and Castaneda's anti-SLAPP motion. Wise does not dispute that her attorney was timely served with Vose's motion for attorney's fees and supporting papers; nor has Wise shown how such service was inconsistent with the requirements of section 1010. She also does not dispute that the motion for attorney's fees clearly requested "the court to grant this motion and Order Mikaela Cadena and Helen Wise to pay $12,851.50, in fees to Ms. Vose." Nonetheless, Wise contends that service of the motion was improper as to her because the motion was not addressed to her and contained statements directed solely to Cadena. The probate court found that Wise was properly served with Vose's attorney's fees motion. Wise provides no persuasive argument or authority demonstrating that she had inadequate notice of the motion for attorney's fees.[11] Accordingly, we affirm the trial court's determination.

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11 Wise's citation to *Cox v. Certified Grocers of Cal., Ltd.* (1964) 224 Cal.App.2d 26, 30 (*Cox*), is unavailing. The *Cox* court considered whether a plaintiff had filed, post-trial, a valid notice of intention to move for a new trial, so as to justify an extension of time to file a notice of appeal. The plaintiff's notice of intention to move for a new trial was addressed to two of the three defendants in the matter and served on the attorneys of only the two defendants to whom it was addressed. The notice was *not* served on the attorney for the third defendant, nor was it served on the third defendant personally. The *Cox* court found that "[s]ince the notice [of intention to move for a new trial] was not addressed to [the third defendant] *and* the affidavit of service by mail does not show that service was made upon him personally or by service upon his attorneys … the trial court lacked all jurisdiction to make an order affecting [the third defendant]." (*Ibid*., italics added.) The present matter is distinguishable from *Cox* in that Vose's motion for attorney fees *was timely served* on Wise's attorney and the motion clearly indicated that Vose was requesting an award of attorney's fees against both Cadena and Wise.

III. Cadena's Duplicative Appeal as Trustee is Moot

After the probate court ruled on Vose and Castaneda's anti-SLAPP motion and dismissed Cadena and Wise's disinheritance petition, Cadena filed notices of appeal in an individual capacity as a beneficiary (F079863), and in a trustee capacity (F080183). She briefed both appeals, raising identical challenges to the trial court's ruling and order on the anti-SLAPP motion. The briefs filed in her appeal as a beneficiary preceded the briefs filed in her appeal as trustee; her briefs as trustee incorporated by reference, her briefs as beneficiary.

We have addressed, in the appeal brought by Cadena as an individual beneficiary, her challenges to the probate court's ruling and order on the anti-SLAPP motion. We have also affirmed the probate court's order awarding attorney's fees to Vose, payable by Cadena as an individual. In light of the probate court's order that fees and costs awarded to Vose are payable by Cadena as an individual, it necessarily follows that any attorney fees and costs on appeal awarded to Vose shall in turn be payable by Cadena as an individual. Accordingly, Cadena's appeal as trustee is moot for present purposes and we need not address it.

IV. Attorney Fees on Appeal

Vose requests, and is entitled to, reasonable attorney fees and costs on appeal. Under section 425.16, subdivision (c), "[a]ppellate challenges concerning the [special] motion to strike are also subject to an award of fees and costs, which are determined by the trial court after the appeal is resolved." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1320; see *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499-1500, 45 Cal.Rptr.2d 624 [because § 425.16, subd. (c), authorizes an award of attorney fees to prevailing party without limitation, appellate attorney fees are also recoverable].) Accordingly, we remand the matter for the probate court to determine, upon the filing of

a memorandum of costs and motion for attorney's fees by Vose, the attorney fees and costs to which she is entitled.

DISPOSITION

The judgment is affirmed, as is the probate court's order on attorney's fees. The matter is remanded for determination of Vose's attorney's fees and costs on appeal.[12]

SMITH, J.

WE CONCUR:

FRANSON, Acting P.J.

SNAUFFER, J.

[12] While this appeal was pending, Vose filed a motion for diminishment of the record on appeal (Respondent's Motion to Strike Improper and Irrelevant Portions of Appellants' Joint Appendix). Since we have ruled in Vose's favor, her motion to strike is denied as moot.